

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOHN M. GUZICK and U.S. POSTAL SERVICE,  
POST OFFICE, Gaithersburg, MD

*Docket No. 99-1027; Submitted on the Record;  
Issued March 19, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits.

On April 29, 1994 appellant filed a notice of traumatic injury and claim for compensation alleging that he injured his back while bending over to pull flats out of a case. The Office accepted the claim for a lumbar sprain. Appellant was treated by Dr. Ayub K. Ommaya, a neurosurgeon, who prescribed a course of physical therapy. He was off work from April 29, 1994 until he was approved for limited duty on June 14, 1994.

The record indicates that appellant sustained a herniated disc at L4-5 in the performance of duty on March 6, 1989 and underwent a laminectomy with a discectomy on February 12, 1990. The Office subsequently expanded the claim (A25-359849) to include aggravation of cervical spondylosis. Appellant returned to work on light-duty status on October 15, 1990. He next filed a claim (A25-421312) for a January 15, 1993 work injury, which was accepted for aggravation/acceleration spondylosis thoracic spine.

An operative report dated February 12, 1990, which was prepared by Dr. Ommaya, reported that appellant received a lumbar laminectomy, discectomy and foraminotomy at L4-5 for repair of a herniated disc at that level.

In a December 2, 1991 report, Dr. Bernard E. Filner, indicated that appellant suffered from chronic myofascial pain syndrome. He recommended that appellant obtain counseling to get him over the feeling that his job was at the root of all of his health problems.

Appellant underwent a magnetic resonance imaging (MRI) scan of the lumbar spine on June 9, 1994 that showed a mild loss of disc height at L5-S1 with no disc herniation, evidence of a prior decompressive laminectomy at L3-4 with a mild disc bulge and a mild central disc protrusion at L4-5.

In a handwritten note dated June 6, 1994, Dr. Ommaya recommend that appellant undergo a work hardening program before he was to return to the full-time duties of a mailhandler.

On August 29, 1994 the Office authorized appellant to participate in a work hardening program from September through December 1994. The last date of his therapy was reported to be December 9, 1994.

On March 2, 1995 the Office authorized a change of physicians to one closer to appellant's residence. He subsequently came under the care of Dr. Joseph Liberman, a Board-certified neurologist.

In a September 12, 1995 report, Dr. Liberman noted that he had evaluated appellant at his office on September 1, 1995 for complaints of low back pain, which at times were so disabling that appellant had to stay in bed and miss work. He reported physical findings and diagnosed chronic low back pain with progression, neck pain and thoracic spine pain. Dr. Liberman recommended that appellant obtain another MRI scan to ascertain whether he had "a new disc problem."

In a CA-20 attending physician's report dated November 6, 1995, Dr. Liberman diagnosed that appellant suffered from a bulging disc and cervical radiculopathy due to his April 29, 1994 work injury. He indicated that appellant was totally disabled from regular work, but that he could perform limited duty with restrictions of no bending and no lifting over 20 pounds.

A November 10, 1995 report of an MRI scan of the lumbar spine showed minimal to mild focal leftward bulging of the L3-4 disc space, posterior decompressive laminectomy at L3-4 with no evidence of recurrent disc herniation or spinal stenosis. A loss of signal activity was noted at L3-4 and L4-5 consistent with degenerative disc disease.

On March 11, 1996 appellant filed a claim for recurrence of disability beginning August 15, 1995.<sup>1</sup> In a statement attached to his CA-2a claim form, he noted that he returned to limited duty in July 1994 and that he had intermittent flare-ups of pain until August 15, 1996 when he had to leave work 2.5 hours early from pain. Appellant further stated that from then on he missed a great deal of time from work due to pain.

Appellant subsequently submitted a report from Dr. Liberman dated March 16, 1996 who noted that appellant was examined on March 11, 1996. He reported that appellant complained of increased back pain after being on his feet for only an hour with only limited activity. Dr. Liberman advised that appellant was totally disabled from work and was unable to work in his light-duty job.

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<sup>1</sup> The Office advised appellant to file a claim for a recurrence of disability since his April 29, 1994 injury claim file had been closed since September 28, 1994. He had previously filed CA-7 claim forms for wage loss pertaining to the April 29, 1994 accepted claim.

In a July 9, 1996 attending physician's report (CA-20a), Dr. Liberman diagnosed bulging lumbar disc and cervical radiculopathy due to the April 29, 1994 work injury. He indicated that appellant was totally disabled.

Appellant submitted a series of CA-8 claims for continuing wage loss from July 9, 1996 through December 31, 1997.<sup>2</sup>

In a July 17, 1996 report, Dr. Liberman indicated that he had examined appellant on July 9, 1996 for chronic low back pain, chronic middle back pain and chronic neck pain. He stated that appellant showed no sign of improvement.

In an August 6, 1996 report, Dr. Joel L. Rosenthal, a Board-certified neurologist and an Office referral physician, noted that appellant had been examined on August 5, 1996. He noted appellant's history of back pain since 1989 and course of treatment. Dr. Rosenthal reported physical findings and stated:

"I do not find any evidence of neurological dysfunction on the current examination. The symptom complex [appellant] describes at present seems to be somewhat greater than might be expected from the findings on scan or from the history in general. I do not find any history at any time of significant radiculopathy as far as I can determine. Certainly, back strains can be associated with lifting injuries, etc. Again, the degree of complaint here seems to be out of proportion to that which is usually seen in back injuries where the only major complaint at the time is that of twisting the back when trying to lift something."

Dr. Rosenthal concluded that there was no specific treatment for appellant's complaints except for continued use of analgesics and perhaps referral to a pain clinic. He opined that appellant was not totally or partially disabled from a "purely medical standpoint." Dr. Rosenthal noted that from appellant's "perception of pain" however that appellant did not feel he was able to return to work.

In an attending physician's report (CA-20a) dated February 23, 1997, Dr. Liberman indicated that appellant remained totally disabled due to his bulging lumbar disc and cervical radiculopathy related to the April 29, 1994 work injury.

By letter dated March 26, 1997, the Office referred appellant for an impartial medical evaluation with Dr. Colin Iosso, a Board-certified neurologist, to resolve a conflict in the medical evidence between appellant's treating physician and the Office referral physician.

In a report dated April 24, 1997, Dr. Iosso discussed appellant's medical history including the development of severe back pain at work in 1989, a February 24, 1990

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<sup>2</sup> The Office award compensation from May 25 to November 18, 1996.

laminectomy with disectomy and his April 29, 1994 work injury. He reported physical findings and diagnosed chronic multifocal pain and paresthesia of uncertain etiology. Dr. Iosso stated:

“Although a review of the records does indicate some degenerative disc changes and disc protrusion on MRI scans none of these is to the degree which could explain the internist and extent of his current and ongoing symptoms. The neurological examination reveals no sign of central or peripheral system dysfunction. None of the medical records provided indicated any objective testing to confirm any central or peripheral nervous system dysfunction.”

Dr. Iosso further stated that he did not believe any of appellant’s continuing complaints or symptoms were attributable to the April 29, 1994 work injury as “[ongoing] pain and parasthesia at this time would not be expected from a sprain or strain type of injury nor from a radiculopathy.” He found no objective evidence of record to support that appellant was partially or totally disabled for any employment, but recommended that appellant resume sedentary work with lifting of no more than 20 pounds and infrequent bending, twisting, or reaching. Dr. Iosso concluded that appellant’s pain symptoms could be attributable to other nonneurogenic sources and recommended psychiatric or orthopedic consultations to better improve his overall function.

On October 27, 1997 the Office issued a “[n]otice of [p]roposed [t]ermination of [c]ompensation and [m]edical [c]are” advising appellant that the evidence of record established that appellant’s accepted lumbar strain had resolved and that he no longer had any residuals related to the April 29, 1994 employment injury.

In a December 2, 1997 decision, the Office terminated appellant’s compensation and medical benefits.

On September 17, 1998 appellant requested reconsideration.

Appellant submitted a December 5, 1997 treatment note from Dr. Liberman in support of his reconsideration request. He noted physical findings and noted that appellant suffered from chronic low back pain, thoracic spine pain and chronic neck pain. He stated, “There is no appreciable change in [appellant’s] symptoms or examination since I last saw him. I believe his condition is permanent.”

In a June 9, 1998 treatment note, Dr. Randy Davis, a Board-certified orthopedic surgeon, noted that appellant was seen at the request of Dr. Liberman for a second opinion regarding appellant’s problems with his lumbar, thoracic and cervical spine. He related:

“In 1990 a neurosurgeon attempted treatment of an L4-5 subligamentous disc herniation with a disectomy hemilaminectomy. [The physician] unfortunately entered in 3 [to] 4 space and performed the surgery at 3 [to] 4 and did not address the 4 [to] 5 problem. Since then [he] has developed a significant lower back pain. There is a radicular component to this. This is intermittently bothersome but when it is bothersome it can be quite disabling. This, [appellant] claims, is his worst problem at this point.”

Dr. Davis also noted that appellant had a cervical degenerative disc condition confirmed by MRI scan in 1990. He reported that a recent MRI scan showed a large disc herniation at C6-7, which appellant attributed to his work duties. Dr. Davis recommended that appellant undergo a cervical discectomy but he did not recommend further surgical intervention for the lumbar disc problem, noting that “after a successful fusion at one or two levels of the lumbar spine, adjacent levels tend to degenerate at a faster level.”

In a report dated August 31, 1998, Dr. Liberman noted that a June 16, 1998 MRI scan of the cervical spine revealed a large disc herniation at C6-7. He attributed this condition to prior work injury and the 1994 work hardening program appellant was required to complete. According to Dr. Liberman, appellant was totally disabled as of March 11, 1996 because he was unable to stand, walk or sit for more than 15 minutes at time without making his pain worse. He diagnosed chronic low back pain with failed back surgery, chronic neck pain due to a herniated cervical disc and chronic thoracic spine pain due to protruding thoracic discs. Dr. Liberman concluded that all of the injuries were related to appellant’s work injuries.

In a December 23, 1998 decision, the Office denied modification following a merit review.

The Board finds that the Office failed to carry its burden of proof in terminating appellant’s compensation benefits.

Once the Office accepts a claim it has the burden of proof of justifying modification or termination of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability has ceased or is no longer related to the employment injury.<sup>3</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals for an employment-related condition which require further medical treatment.<sup>4</sup>

The Office accepted that appellant sustained a herniated disc and an aggravation of cervical spondylosis in the performance of duty on March 6, 1989. The Office further approved him to receive a laminectomy and discectomy on February 12, 1990. Although appellant returned to limited duty on October 15, 1990, he continued to receive medical benefits and was treated on a regular basis for complaints of lower back and neck pain. He subsequently sustained an injury on January 15, 1993 that was accepted for aggravation/acceleration of spondylosis of the thoracic spine. Appellant again returned to limited duty and was most recently injured at work on April 29, 1994 when he sustained a lumbar sprain.

In order to ascertain whether appellant had any continuing disability or residuals related to his accepted work injuries, the Office referred appellant to Dr. Rosenthal, who opined that

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<sup>3</sup> *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).

<sup>4</sup> *Arthur Sims*, 46 ECAB 880 (1995).

appellant was neither partially or totally disabled from work and that there was no neurological evidence to support appellant's continuing complaints of pain. He noted, however, that appellant would benefit from attending a pain clinic since appellant was certainly unable to do any work based on his perception of pain.

In contrast, appellant's treating physician, Dr. Liberman, reported MRI scan findings to demonstrate that appellant continued to have a herniated disc at L4-5 and also evidence of a prior laminectomy at L3-4 with a mild disc bulge. He opined that appellant was totally disabled effective July 9, 1996.

Because a conflict existed in the record between Drs. Liberman and Rosenthal, the Office properly referred appellant for an impartial medical evaluation with Dr. Iosso.<sup>5</sup> In his April 24, 1997 report, Dr. Iosso opined that appellant was neither partially nor totally disabled from work due to the April 29, 1994 work-related lumbar strain. He specifically noted that appellant had no objective evidence of a neurological disorder.

Although the Office assigned controlling weight to Dr. Iosso's opinion as the impartial specialist, the Board concludes that his opinion is not sufficiently reasoned to conclude that appellant has no continuing disability or residuals related to her work injuries. Dr. Iosso was unable to rule out whether or not appellant had an orthopedic problem and no neurological problem that would prevent him from returning to work. This seems particularly relevant since recent MRI scans suggest that appellant still has a herniated disc at L4-5 despite surgery.

Furthermore, with respect to the issue of medical benefits, Dr. Iosso did not discuss whether appellant had any residuals from either his cervical, thoracic or lumbar conditions that might require additional medical treatment. The crux of his medical analysis was whether appellant had recovered from his April 29, 1994 lumbar strain; however, the Office has accepted that appellant sustained a herniated disc at L4-5 and aggravation and acceleration of degenerative disc changes in the cervical and thoracic spine.

Additionally, Dr. Iosso acknowledged that appellant's symptoms of pain could be attributable to a psychological component. Given that both appellant's treating physician and the Office referral physician have suggested that appellant suffers from myofascial pain syndrome, this aspect of appellant's work injury should have been addressed. The Office, therefore, failed to carry its burden of proof in terminating appellant's medical benefits.

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<sup>5</sup> Section 8123(a) of the Federal Employees' Compensation Act provides that, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." See 5 U.S.C § 8123(a).

The decision of the Office of Workers' Compensation Programs dated December 23, 1998 and December 2, 1997 are hereby reversed.

Dated, Washington, DC  
March 19, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Member